SUPREME COURT U. S.

IN THE

# Supreme Court of the United States

Office-Supreme Court, U.S.
FILED
JAN 8 1968
JOHN F. DAVIS, CLERK

OCTOBER TERM, 1967

Nos. 800, 946, 969

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WORLD AIRWAYS, INC., TRANS INTERNATIONAL AIRLINES, INC., SATURN AIRWAYS, INC., PURDUE AERONAUTICS CORP., CAPITOL INTERNATIONAL AIRWAYS, INC. and AMERICAN FLYERS, INC.,

*Petitioners,*

—v.—

PAN AMERICAN WORLD AIRWAYS, INC., TRANS WORLD AIRLINES, INC. and AMERICAN AIRLINES, INC.,

*Respondents.*

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CIVIL AERONAUTICS BOARD,

*Petitioner,*

—v.—

PAN AMERICAN WORLD AIRWAYS, INC., TRANS WORLD AIRLINES, INC. and AMERICAN AIRLINES, INC.,

*Respondents.*

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AMERICAN SOCIETY OF TRAVEL AGENTS, INC.,

*Petitioner,*

—v.—

PAN AMERICAN WORLD AIRWAYS, INC., TRANS WORLD AIRLINES, INC. and AMERICAN AIRLINES, INC.,

*Respondents.*

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## BRIEF IN RESPONSE TO PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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January 8, 1968

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## BRIEF IN RESPONSE TO PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Respondents, Pan American World Airways, Inc., Trans World Airlines, Inc. and American Airlines, Inc., submit this brief in response to the petition for a writ of certiorari filed by the Solicitor General on behalf of the Civil Aeronautics Board (No. 946) (hereinafter "Board"), the separate petition for a writ of certiorari filed jointly by World Airways, Inc., Trans International Airlines, Inc., Saturn Airways, Inc., Purdue Aeronautics Corp., Capitol International Airways, Inc. and American Flyers, Inc. (No. 800) (hereinafter "Supplementals"), and the separate petition for a writ of certiorari filed by American Society of Travel Agents, Inc. (No. 969) (hereinafter "ASTA").

This brief is not submitted in opposition to the granting of a writ of certiorari herein. Its purpose is only to acquaint the Court with the narrow issues decided by the Court of Appeals, which, in view of its decision, held it "need not pass on the other points raised" by respondents (380 F. 2d 770 at 782).

## Question Presented

In view of the limited decision below, the only question presented is whether the Court of Appeals correctly construed Public Law 87-528 as not intended by Congress to empower the Civil Aeronautics Board to authorize supplemental air carriers, certificated under that law, to operate in conjunction with tour operators (travel agents) so-called "inclusive tours", whose patronage is derived from individual solicitation and ticketing of members of the general public by the travel agents.

The petition filed by the Solicitor General on behalf of the Civil Aeronautics Board (Board) agrees that the only question presented is whether the Board has the power to

writ of certiorari. They believe for that reason that no useful purpose would be served at this stage by stating the case as they view it and will defer such a statement until briefs on the merits are submitted.

Because petitioners assert, however, that *Waterman, supra,* does raise questions for review at this juncture, respondents set forth below their reasons why review by this Court should be limited to the question of the Board's statutory power under Public Law 87-528.

## Reasons for Denying the Writ as to Asserted "Waterman" Questions

### I

The Court of Appeals correctly held that it was not precluded from reviewing the question raised as to the Board's authority under Public Law 87-528 simply because the orders raising the question had been approved by the President under Section 801 of the Federal Aviation Act (Act), since international air transportation was involved. As already pointed out (*supra,* p. 3), the Solicitor General agrees that this Court's decision in *Chicago & Southern Air Lines, Inc.* v. *Waterman Steamship Corp.,* 333 U. S. 103 (1948), does not support the supplemental air carriers' contention that the court below could not review the question of the Board's power.

The decision of the court below was entirely consistent with the decision of this Court in *Waterman.* This Court explicitly noted there that the petitioner did not challenge the regularity of the Board's proceeding nor did the petitioner raise any justiciable issue as to the Board's statutory authority, the very questions raised here. The sup-

plemental air carriers have not pointed to any other decision of any court which would preclude review of such questions.

Although orders of the Board involving overseas or foreign air transportation are subject to Presidential approval under §801 of the Act, unless an order is within the Board's power to issue it, there is no occasion for the exercise of Presidential discretion. Foreign policy considerations are pertinent to the President's exercise of his discretion to approve or disapprove valid orders. The scope of the Board's power depends not upon the exercise of Presidential discretion with its attendant foreign policy considerations, but is a question of proper statutory construction. Statutory construction is certainly not one of those matters which this Court said "have long been held to belong to the domain of political power not subject to judicial intrusion or inquiry" (333 U. S. at 111).

The contention of the supplemental air carriers that *Waterman* completely bars judicial review of any Board action approved by the President rests on the untenable assumption that although Congress has authorized the issuance of certificates only under defined conditions and in accordance with specified procedures, the Board with the approval of the President may issue certificates under other conditions and without complying with those procedures. But however broad the President's power in the field of foreign affairs, when his action is taken, as here, by reason of a Congressional grant of authority, his action is not immunized from judicial scrutiny by reason of his constitutional authority. The question may still be raised—and examined by the courts—as to whether the Congressional delegation of power was exceeded in this case. See, *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579, 637 (1952) (Jackson, *J.* concurring).

## II

The Board's attempt to raise the question of the application of *Waterman* to "procedural defects" (Board, p. 5, fn. 5) is premature since the court below did not have to reach the question raised by the Board's improper procedure and the application of *Waterman* thereto. Where "other grounds of reversal urged by respondents were not reached by that court [the Court of Appeals], the case is remanded to it for further proceedings in conformity with this opinion." *Salem* v. *U. S. Lines Co.*, 370 U. S. 31, 38 (1962). "The Court of Appeals, in view of its disposition of the case, found it unnecessary to consider any of these questions. They are not related to the major issue in the case" and therefore this Court should follow its decision in *Calmar Steamship Corp.* v. *Scott*, 345 U. S. 427, 444 (1953) and, if it should decide in favor of petitioners on the merits, "remit them [the questions not reached by the Court of Appeals] to the Court of Appeals." See also *Chaunt* v. *United States*, 364 U. S. 350, 356 (1960); *Federal Trade Comm.* v. *Anheuser-Busch, Inc.*, 363 U. S. 536, 542 (1960); *United States* v. *Republic Steel Corp.*, 362 U. S. 482, 493 (1960); *Alaska* v. *American Can Co.*, 358 U. S. 224, 227 (1959); *Bank of America* v. *Parnell*, 352 U. S. 29, 34 (1956).

## CONCLUSION

**Respondents respectfully submit that this Court should review only the question of the Board's statutory authority to authorize supplemental air carriers to engage in inclusive tours.**

Respectfully submitted,

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January 8, 1968